MERIT SYSTEM REPORTER

A digest of notable Merit System decisions

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IN THIS ISSUE

TO OUR READERS:

On February 4, 1998, Governor Whitman named Janice Mitchell Mintz as Acting Commissioner of the Department of Personnel and announced her intention to nominate Ms. Mintz as Commissioner of the department. Ms. Mintz was

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NEW JERSEY DEPARTMENT OF PERSONNEL

Shaping a quality work force through competence, caring and commitment

Christine Todd Whitman
Governor

www.state.nj.us/personnel

Janice Mitchell Mintz
Commissioner

confirmed as our new Commissioner effective June 22, 1998.

Ms. Mintz received a bachelor's degree in English, magna cum laude, from the University of Delaware and earned her law degree at Temple University Law School. She served as First Assistant Attorney General from July 1996 to February 1998. From January 1994 to June 1996, she was a Senior Associate Counsel and Deputy Chief of Staff to Governor Whitman.

Previously, Ms. Mintz was in the private practice of law and served as an Assistant Counsel to Governor Kean from 1984 to 1989. She and her husband have two children.

Another recent Merit System Board appointee is Judith L. Shaw. Ms. Shaw is currently a partner in a consulting service, having previously served as Governor Whitman's Chief of Staff, Chief of Staff to the Commissioner of Transportation, Aide to Governor Kean, and Deputy Director for the NJ State Lottery. Ms. Shaw's term expires on March 23, 2000.

WRITTEN RECORD APPEALS

Hearing Warranted for Two Five-Day Suspensions Stemming from Same Incident

In the Matter of Tibor Berensci
(Merit System Board, decided Oct. 7, 1997)

Tibor Berensci, Park Police Lieutenant, Middlesex County Parks and Recreation, represented by Joseph J. Benedict, Esq., appeals charges stemming from an incident on August 11, 1996. The appointing authority issued a Preliminary Notice of Disciplinary Action dated September 20, 1996, seeking a suspension for 30 days on charges of neglect of duty, and held a hearing on December 4, 1996. Appellant received a Notice of Minor Disciplinary Action dated February 19, 1997 which advised that he was suspended for five days commencing on February 20, 1997 on charges relating to an incident on August 11, 1996.

In a letter dated February 25, 1997 and postmarked February 27, 1997, appellant filed an appeal to the Merit System Board regarding the Notice of Minor Disciplinary Action dated February 19, 1997. On March 19, 1997 appellant was advised that pursuant to civil service law, the Board does not review appeals of minor discipline, five days or less, taken against employees of a county or municipal government since the legislature has limited such reviews to State employees pursuant to *N.J.S.A.* 11A:2-16.

On March 17, 1997 the appointing authority issued a Notice of Minor Disciplinary Action which advised that appellant was suspended for five days commencing on March 18, 1997 on charges relating to an incident on August 11, 1996. In a letter dated April 11, 1997 and postmarked April 14, 1997, appellant advised the Board that he was in fact suspended a total of ten days.

N.J.S.A. 11A:2-15 provides that any appeal from adverse actions specified in *N.J.S.A.* 11A:2-13 and subsection a.(4) of *N.J.S.A.* 11A:2-6 shall be made in writing to the Board no later than 20 days from receipt of the final written determination of the appointing authority. The Board sought the parties' position on the issue of whether appellant timely appealed the second five-day suspension issued on March 17, 1997. Appellant argues that since both disciplinary actions arose out of the same incident, it would seem appropriate to incorporate the second suspension into the appeal of the first suspension. The appointing authority does not dispute appellant's position and submits the issue of timeliness to the Board's discretion.

Initially, it is noted that Mr. Berensci received two minor disciplinary actions of five days for the same incident on August 11, 1996. As a result, the charges against Mr. Berensci represent major discipline of a ten day suspension, which if his appeal is timely filed, warrants the granting of a hearing. *See N.J.S.A.* 11A:2-6(a). In light of the fact that appellant timely appealed the first suspension and the second suspension arose out of the same incident on August 11, 1996, the Board finds that appellant's appeal is timely. Accordingly, this

matter should be referred to the Office of Administrative Law for a hearing.

Order

Therefore, it is ordered that this matter be referred to the Office of Administrative Law for a hearing.

Untimely Service of Preliminary Notice of Disciplinary Action Warrants Back Pay/Fiscal Improprieties Warrant Immediate Suspension

In the Matter of Kenneth F. Hixenbaugh
(Merit System Board, decided Feb. 24, 1998)

Kenneth F. Hixenbaugh, Director, Salem County Board of Social Services (County Board), represented by John M. Waters, Jr., Esq., requests interim relief regarding his immediate suspension pending the outcome of disciplinary charges.

Mr. Hixenbaugh contends that he was notified orally on December 18, 1997 that he was immediately suspended, but did not receive the initial Preliminary Notice of Disciplinary Action (PNDA), which was dated December 29, 1997, until January 5, 1998. The PNDA provided that petitioner was suspended effective December 18, 1997, pending final disposition by the County Board, but did not specify the basis for the immediate suspension as provided in *N.J.A.C.* 4A:2-2.5(b). Petitioner additionally contends that he requested a hearing which was specified on the PNDA as being held on January 20, 1998. However, on that date, the County Board rescheduled the hearing for January 22, 1998, which was its regular meeting date. In this regard, petitioner contends that the latter date is in violation of *N.J.A.C.* 4A:2-2.5(d) because it is more than 30 days after initiation of the disciplinary action.

Petitioner was charged with causing his subordinates to pay five agency employees, including himself, more than the authorized amount of bonus payments, and failing to disclose these actions to the County Board or seek ratification or further authorization of these actions. Petitioner contends that on January 22, 1998, at the meeting, he was notified orally that the County Board would impose additional disciplinary action in the form of removal, and issued an amended PNDA to include additional charges incorporating the preliminary findings of an audit report.

In response, the appointing authority, represented by John Ford Evans, Esq., contends that on August 28, 1997, Mr. Hixenbaugh requested the County Board's approval for bonus payments to five employees, including himself. In response to the County Board's question as to why the request was being presented four months early, petitioner stated that he wanted to present the bonuses at the time of his final evaluation meetings with the employees in question. It is noted that the appointing authority contends that upon its later investigation of personnel files, no written evaluation reports were found for these four employees for either 1997 or 1996. However, in a divided vote, the County Board approved the bonus requests at its August 28, 1997 meeting.

The appointing authority further attests that on August 29, 1997, petitioner issued bonus checks to himself and his secretary in the amounts approved by the County Board less mandatory withholding. However, on September 8, 1997, contrary to established practice and without authorization, he issued additional checks to his secretary and himself in the amount that had been withheld from the checks issued on August 29, 1997. At this time, he also ordered, by a written directive, that a subordinate employee issue bonus checks to three other employees for the full amount authorized, rather than for the amount authorized less the mandatory withholding. The appointing authority argues that by these actions, petitioner increased the actual paid bonuses to greater than the authorized amounts. Petitioner acknowledged these actions in closed session at the County Board's December 18, 1997 meeting, stating that he believed that his conduct was appropriate.

Based on its belief that petitioner's action in regard to the bonus checks might be indicative of other fiscal misconduct, the County Board retained the services of an auditor to examine the records of the agency as they affected petitioner and other bonus recipients. The County Board also referred

the matter to the Salem County Prosecutor for determination as to whether criminal charges should be filed. The County Board further concluded that it was necessary to deny petitioner access to the records under investigation; therefore, petitioner should not be returned to his position for the period of the audit and criminal investigation. The County Board also considered that returning petitioner to his position would give the appearance to the public and agency employees that the County Board did not take the matter seriously. Accordingly, the County Board advised petitioner that he was suspended without pay until further determination of his status, which would be occurring on or about January 22, 1998, the next regular meeting of the County Board. It is noted that the appointing authority acknowledges that the PNDA was submitted in an untimely fashion based on the unavailability of trained staff at the time.

The appointing authority argues that under the circumstances presented, if petitioner had been permitted to continue employment, the orderly administration of public services would have been adversely affected. Immediate suspension was essential in order to ensure that petitioner's access to records would not impede the investigation of those records. Additionally, petitioner's continued performance as Director would have been severely limited and agency services would have been disrupted, since employees were aware that petitioner was under investigation for financial irregularities.

Conclusion

N.J.A.C. 4A:2-2.5 *et seq.*, provides that an employee may be suspended immediately and prior to a hearing when the employee has been formally charged with certain crimes or where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. The rule further provides that when an appointing authority suspends an employee prior to a hearing, a PNDA with an opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.

In this matter, petitioner was suspended pursuant to *N.J.S.A.* 11A:2-13 and advised that a hearing would be held for the purpose of disciplining him. The appointing authority's immediate suspension of petitioner was based on its determination that suspension was necessary in order to maintain order and effective direction of public services. In reviewing this matter it is not necessary to address the merits of the charges against the petitioner. Rather, the issue here is whether the nature and seriousness of the charges support the necessity for an immediate suspension. In the present matter, petitioner has been charged with fiscal impropriety as well as causing a subordinate to commit fiscal impropriety. It is clear that this type of misconduct can pose a serious threat to the orderly operations of the agency and its ability to deliver public services effectively. Under these circumstances, and in view of the fact that the appointing authority initiated an audit to determine the existence of other fiscal irregularities, its determination that an immediate suspension was necessary to maintain order and effective direction of public services was justified.

Petitioner is entitled to adequate notice of the charges against him and an opportunity to prepare a defense. However, the procedural deficiencies were not substantive and do not require dismissal of the charges or interim relief reinstating petitioner to his position. The record establishes that on the date of the suspension, the County Board notified Mr. Hixenbaugh that he was to be suspended and provided him orally with the reasons for the suspension which related to fiscal misconduct. He was also provided with the approximate date for the departmental hearing, and advised that the suspension was indefinite pending the results of an audit and of a criminal investigation. He was informed that additional charges might be forthcoming based on the results of the audit. Additionally, Mr. Hixenbaugh was provided with an opportunity to present his response in regard to the charges related to fiscal misconduct. Therefore, no basis has been presented to establish that the appointing authority was not in compliance with *N.J.A.C.* 4A:2-2.5(b). Moreover, with regard to the departmental hearing, *N.J.A.C.* 4A:2-2.5(d) provides that such a hearing, if requested, shall be held within 30 days of the PNDA. The hearing does not, as Mr. Hixenbaugh argues, need to be held within 30 days of the suspension. Therefore, it has not been demonstrated that the hearing held on January 22, 1998 was in violation of *N.J.A.C.* 4A:2-2.5(d). However,

the record establishes that the appointing authority was not in compliance with *N.J.A.C.* 4A:2-2.5(a)1, which provides that a written PNDA must be served on the employee within five days following the immediate suspension. This time limit is critical in the context of an immediate suspension without pay. Notwithstanding that sufficient basis has been presented to support the immediate suspension, it is appropriate to institute a remedy for the appointing authority's failure to serve the PNDA within the prescribed time frames. Specifically, since Mr. Hixenbaugh did not receive the PNDA until January 5, 1998, well after December 23, 1997, the last date as provided in the rule for issuing a PNDA, it is appropriate that he be awarded back pay for the period from December 24, 1997 through January 5, 1998, the date he received the PNDA. The Board notes that this award is to remedy the appointing authority's procedural deficiency in regard to *N.J.A.C.* 4A:2-2.5(a)1 (PNDA) only, and not in regard to any alleged deficiencies in regard to *N.J.A.C.* 4A:2-2.5(b) or (d).

Order

Therefore, it is ordered that Mr. Hixenbaugh be awarded back pay for the period from December 24, 1997 through January 5, 1998. It is further ordered that his request for reinstatement pending the completion of departmental discipline procedures be denied.

Removal from Eligible List Upheld for Violation of Settlement Agreement

In the Matter of Walter Beresford, Fire Chief, Belleville

(Merit System Board, decided Feb. 10, 1998)

Walter Beresford, represented by Michael A. Querques, Esq., appeals the decision of the Certification/Placement Services Unit removing his name from the Fire Chief (PM0097T), Belleville eligible list based on an unsatisfactory background report.

The appellant served as a Fire Chief in Belleville from April 1990 to September 1, 1993 when he was removed on charges of conduct unbecoming a public employee, misuse of public property, neglect of duty and misappropriation of funds. The Preliminary Notice of Disciplinary Action was dated September 1, 1993. A settlement agreement was executed on February 16, 1994 which provided, in part, for a four-month suspension after which appellant would be demoted to Deputy Fire Chief on January 1, 1994. A Final Notice of Disciplinary Action dated February 28, 1994 was issued incorporating this agreement. Moreover, in order to induce the Township of Belleville to enter into this settlement agreement, the appellant agreed not to take the next promotional examination for Fire Chief. In a letter to Stephen Cuccio, Belleville Township Manager, dated February 16, 1994, the appellant's previous attorney, Anthony R. Mautone, stated that the appellant agreed not to be considered for the position of Fire Chief if that position was to be filled by direct appointment at that time. The letter also stated that the appellant would not take the next examination if one is called for by the Township to fill the position of Fire Chief. The appellant and his attorney signed this letter.

The appointing authority requested the removal of the appellant's name from the Fire Chief (PM0097T) list because of his prior employment history, the terms of the settlement agreement and the pledge made on the appellant's behalf by his attorney and acknowledged by the appellant that he would refrain from seeking appointment to the title of Fire Chief at the present time and would not take the next promotional examination. It is noted that the eligible list from which the appellant's name has been removed resulted from the next examination referred to in Mr. Mautone's letter. The appointing authority contends that his previous poor job performance while serving as Fire Chief is in and of itself sufficient grounds for removal of his name from the subject eligible list in accordance with *N.J.A.C.* 4A:4-6.1.

On appeal to the Merit System Board, the appellant claims that his previous agreement with the appointing authority is not binding since he was coerced into signing that agreement. On the other hand, the appellant argues that only the agreement is binding and not the letter from Mr. Mautone. He further asserts that he has been denied due process since the Department of Personnel's May 7, 1996 Certification Disposition Notice recites the language of the New Jersey Administrative Code

without providing a factual basis to support its decision to remove his name from the promotional list for Fire Chief. Moreover, he maintains that he should be afforded the opportunity for a hearing to offer evidence in support of his position and qualifications and to refute information and statements used to his detriment. The appellant asserts that the letter prepared by his previous attorney and signed by the appellant indicating that he would not seek the position of Fire Chief or take the next examination for that title violates his constitutional and statutory rights to due process. The appellant also claims that his right to veterans' preference has been violated.

The appointing authority, represented by Mark S. Ruderman, Esq., maintains that appellant's employment history relates adversely to the title. Moreover, it argues that it reasonably relied on the appellant's express agreement that he would not take the next promotional examination for Fire Chief. The appointing authority further claims that in spite of the appellant's assertions to the contrary, the February 16, 1994 agreement and pledge to refrain from taking the next examination for Fire Chief made and signed by the appellant in Mr. Mautone's letter of the same date are valid and enforceable pursuant to applicable contract law. The appellant was represented by counsel in the execution of both of these documents. The appointing authority also contends that had these agreements not been valid as the appellant now claims, the appointing authority would never have allowed him to resume employment in the position of Deputy Fire Chief.

Conclusion

The appellant requests a hearing on this matter. List removal appeals are treated as a review of the written record. *See N.J.S.A.* 11A:2-6(b). Hearings are granted only in those limited instances where the Board determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). No dispute of material fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service,* 155 *N.J. Super.* 517 (App. Div. 1978).

The appellant and appointing authority entered into a settlement agreement in which the appellant received a four-month suspension and demotion to Deputy Fire Chief on charges of conduct unbecoming a public employee, misuse of public property, neglect of duty and misappropriation of funds. This settlement was in lieu of the termination of the appellant originally sought by the appointing authority. As an inducement for the appointing authority not to seek the appellant's termination and to enter into the settlement agreement, the appellant signed a statement which indicated that he would not file for the next Fire Chief examination when it was announced.

It is noted that the policy of the judicial system strongly favors settlement, and a settlement will not be set aside absent compelling circumstances. *Nolan v. Lee Ho*, 120 *N.J.* 465 (1990). This policy is equally applicable in the administrative area. Moreover, a settlement agreement should be enforced where a party has been represented by competent legal counsel and entered into the agreement knowingly and voluntarily. In this matter, the appointing authority and the appellant were both represented by competent legal counsel and voluntarily entered into the terms of the agreement executed in February 1994. The appellant violated his legally binding pledge not to take the next promotional examination for Fire Chief and as a result, sufficient basis exists to remove his name from the subject eligible list.

Additionally, *N.J.A.C.* 4A:4-6.1(a)7 and *N.J.A.C.* 4A:4-6.1(a)9 allow the Board to remove an eligible's name from an employment list for a prior employment history which relates adversely to the title sought and for other sufficient reasons. The appellant has an employment record which relates adversely to the position sought as demonstrated by the severity of the charges filed in 1993, which resulted in a four-month suspension and a demotion to Deputy Fire Chief. Further, the charges occurred while he was a Fire Chief, the same position for which he now seeks employment. It is also noted that the appellant was demoted to Fire Captain for disciplinary reasons effective January 30, 1997 and suspended. The appellant has appealed those actions to the Merit System Board and those matters are pending. Accordingly, the Board did not consider those matters in the subject appeal.

Order

Therefore, it is ordered that this appeal be denied.

Non-Standardized Test Conditions Warrant Readministration of Performance Examination

In the Matter of Virginia G. Brown, et al. Middlesex Vicinage

(Merit System Board, decided April 21, 1998)

Mark Rosenbaum, Esq., on behalf of Virginia G. Brown, Georgeanna Deuerlein, Ann V. Kilduff, Chris Mychalchyk, and Debra Suarez, appeals the decision of the Division of Human Resource Selection Services which found that appellants could not be placed on the eligible list for Senior Data Entry Machine Operator (S1725T), Middlesex Vicinage based on their failure to satisfy the performance criteria for the open-competitive examination.

The subject examination consisted of an unassembled component which ranked candidates based on an evaluation of their education and experience followed by a pass/fail performance test which was administered by the appointing authority at the time of certification. In the present matter, the subject eligible list was certified to the Middlesex Vicinage.

On December 3, 1995, appellants Brown, Kilduff and Suarez were hired provisionally as Senior Data Entry Machine Operators, pending open-competitive examination. These appellants were separated from employment on October 24, 1997, following their removal from the eligible list after having failed the performance component of the examination. It is noted that none of these appellants had permanent status in another title. The resultant vacancies were filled by eligibles Bishia Chi, Maya Makwana, and Ed Phipps.

Appellants argue that the performance examination is flawed, noting that all candidates who took this examination failed to achieve a passing score. Specific concern was raised that the passing score is unreasonably high and that the conditions for examination administration were deleterious to successful performance in that the examination was not held in a private room; in fact, there were distractions such as ringing telephones and business conversations. Additionally, the keyboard was unfamiliar to the candidates who have experience with CRT terminals rather than the personal computers used for testing. Further, appellants present that inequity exists in that employees serving in the Data Entry Machine Operator title were exempt from taking the performance examination. Lastly, appellants Brown and Deuerlein appeal their score on the unassembled examination.

As to the validity of the performance examination, a thorough investigation finds that the skill tested is a direct reflection of the class specification for the title, which states in part that the worker "operates an electronic key entry machine by depressing appropriate keys in order to enter data from coded source documents onto key-to-tape and/or key-to-disk and/or through direct online hookup with a computer." Candidates were given records containing data to be entered via a personal computer. A 15 minute practice session was provided. The pass point for the performance examination was 115 keystrokes per minute (SPM) which falls within the range of appropriate standards used to assess data entry skill. The fact that none of the candidates tested in the Middlesex Vicinage achieved this score may be attributed to title misclassification which is an issue that the Middlesex Vicinage may pursue through appropriate channels. It is noted that in the Fall, 1997, the Division of Human Resource Selection Services introduced "Tapdance", a computer-administered data entry test. Performance statistics of candidates who had been evaluated through "Tapdance" were analyzed to establish a pass point for this test version. The standard was set at 97 SPM and will be applied to future data entry performance examinations.

Mr. Rosenbaum presents that appellants Deuerlein and Mychalchyk, and Perez (non-appellant in this case) had passed typing tests for their permanent certification as Senior Docket Clerk Typist and Docket Clerk Typist. This does not negate the need to take and pass the subject performance examination for two reasons. First, the examination was open competitive and, absent proof of successful completion of a prior data entry performance test, testing of all interested eligibles is required. It is noted that evidence of successful completion of a prior data entry performance test would also be required to waive a current performance test in a promotional situation. Second, a typing performance examination is distinct and separate from a data entry performance

examination.

As to examination administration issues, a review of the record indicates that the site was inappropriate in that distractions existed which could have adversely impacted test performance. However, the method is not flawed in that personal computers are appropriate for use in testing data entry skills and the practice session provided is meant to familiarize candidates with the equipment.

Lastly, the unassembled examination papers for appellants Deuerlein and Brown have been reviewed and the assigned grades are found to be accurate. As to Ms. Deuerlein's concern that she has received different rankings, it is noted that the subject open competitive examination and the promotional examination PM3497M produced separate eligible lists. Ms. Brown presents that she received different ranks for Senior Data Entry Machine Operator S1762T and S1725T and that she did not receive scoring credit for her coursework. Since candidate pools for different symbols vary, rank is affected by the performance and size of the specific group of test takers. In the present matter, all test takers for all examinations were evaluated using the same scoring criteria. Under these circumstances, Ms. Deuerlein's ranks on the promotional and open competitive test at issue are correct. Similarly, Ms. Brown's ranks on the S1762T and S1725T lists are correct. As to the unassembled examination score, candidates could receive a total of two points for college level data processing coursework and a total of one point for formal training in data processing. The Division of Human Resource Selection Services accepts specific courses found to be related to the type of data entry required. Ms. Brown's coursework in "computerized accounting/typing" is not considered applicable. As to Ms. Brown's claim that an unspecified component of this course included data entry, such information is not quantifiable for purposes of assigning scoring credit. Moreover, this information is clearly untimely since it was not provided until two years after the closing date for filing applications.

Conclusion

A thorough review of the record indicates that the examination process was flawed both by the exclusion of candidates with permanent status in the lower title from performance testing and by the site selected for test administration. Although the pass point was set based on appropriate criteria, a new testing instrument and pass point set through careful study is now available for use. However, appellants Deuerlein and Brown's argument against the unassembled examination scoring is not supported by the record. The ranks and scores which were initially determined for both appellants are accurate.

Order

Therefore, it is ordered that the appeal be granted in part. Absent proof of successful completion of a prior data entry performance test, all individuals certified from the subject list, including those who have permanent status as Data Entry Machine Operators, are to be tested by Division of Human Resource Selection Services at its Trenton facility using the "Tapdance" data entry examination and the established pass point for this test version. It is further ordered that the original unassembled examination scores stand. It is noted that Mr. Rosenbaum has requested that appellants Brown, Kilduff, and Suarez be reinstated pending the outcome of the new test results. In this regard it is noted that the Board has no authority to reinstate provisional employees to the title in which they were serving.

Date of Appointment Establishes Volunteer Preference for Firefighter Eligible List

In the Matter of Charles P. Mangione, Firefighter, Woodbridge Township
(Merit System Board, decided May 8, 1998)

Charles Mangione requests that his name be placed on the Firefighter (M0796U), Woodbridge open-competitive employment list which was limited only to members of the Woodbridge Township Fire District #1 who had two years of active service as a volunteer.

The subject examination, announced in January, 1996, indicated an announced closing date of February 29, 1996 for

submission of applications. A second examination, M0779U, open to residents of Woodbridge Township, was also announced in January, 1996. Appellant, believing he was not eligible for the volunteer announcement since he did not have two years' volunteer service by the closing date, applied only for the examination open to all municipal residents, M0779U. *N.J.A.C.* 4A:4-2.3 (b) stipulates that all requirements must be met as of the announced closing date.

In accordance with *N.J.S.A.* 40A:14-44, the volunteer list takes priority over the resident list. However, this statute specifically establishes the appointment date, rather than the closing date, as the appropriate date for determining whether a volunteer Firefighter has accumulated the requisite two years of service. Appellant took and passed the examination and achieved a final examination score of 87.450.

Conclusion

Appellant has served in excess of two years as a volunteer Firefighter in Woodbridge Township. Therefore, in accordance with the applicable statute, which is controlling notwithstanding the rule cited above, appellant does qualify to have his name placed on the volunteer employment list, M0796U, which takes priority over the resident employment list, M0779U.

Order

Therefore it is ordered that appellant's name be transferred from the Firefighter (M0779U), Woodbridge Township resident employment list to the Firefighter (M0796U), Woodbridge Township volunteer employment list. In accordance with *N.J.S.A.* 40A:14-45, appellant's score will be adjusted to give him the extra service credit due to volunteer Firefighters.

HEARING MATTERS

With the signing in April of 1996 of Executive Order #49, Governor Whitman announced a zero-tolerance policy for violence in the workplace. Since that time, significant efforts have been made by the Department of Personnel to raise awareness as to this pervasive problem, including the development of workplace violence training at our Human Resource Development Institute (HRDI). This training is mandatory for all State employees and is available upon request to local jurisdictions. The first four decisions which follow address situations in which an employee has been disciplined for inappropriate conduct toward a co-worker. These decisions are illustrative of the problem of workplace violence and provide examples of when administrative charges are appropriate under those circumstances.

Additionally, we have included a recent Merit System Board decision involving the suspension of a Firefighter for violation of department regulations prohibiting the growth of facial hair. These regulations are promulgated for safety reasons related to the use of self-contained breathing apparatus (SCBA); however, Firefighters have objected to the application of such regulations on the basis of their religious beliefs and/or medical conditions.

Penalty Reduced for Confrontation with Subordinate Based on Lack of Prior Major Discipline

In the Matter of Charles Campbell
(Merit System Board, decided May 19, 1998)

Appellant, Charles Campbell, Public Works Superintendent, Department of Public Works, Township of Deptford (Township), was demoted in lieu of layoff from his permanent position as Superintendent of Public Works, effective May 15, 1996, for reasons of economy and efficiency. He was also removed on charges of misconduct, effective September 5, 1996. Administrative Law Judge Joseph Lavery (ALJ) found that, on the date of the incident giving rise to the charge of misconduct, appellant was serving as Acting Supervisor in the absence of the Supervisor, Howard Johnson. In his role, he advised Thomas Kersey, a truck driver, that his job assignment needed to be changed based on the needs of the day. Kersey then initiated a spirited conversation with appellant and both men began walking to the Public Works office. When Kersey asked why his work assignment needed to be changed, appellant attributed the cause by pointing his finger at Vincent Emma, another employee, who was standing nearby. Emma objected to appellant pointing at him, and a heated verbal exchange and brief altercation ensued, during which appellant and Emma came chin-to-chin. Once the incident ended, appellant and Kersey moved away from Emma and entered the Public Works office. Based upon the testimony, the ALJ found that appellant angrily provoked Emma, causing the verbal exchange and confrontation. The ALJ sustained the charge of misconduct, but modified the penalty of removal to a 10-day suspension.

The Merit System Board (Board) agreed that appellant's behavior was inappropriate and that termination was too harsh a penalty. However, the Board noted that the ALJ did not consider appellant's prior history of discipline, which included a written warning and a five-day suspension, in determining the penalty. The ALJ had maintained that these incidents should not be considered since they involved discipline from

which no appeal was available, since appellant was not a union member. While the ALJ concluded that according to *West New York v. Bock,* 38 *N.J.* 500 (1962), only "informal adjudications" from which some form of due process is provided can be reviewed as evidence of prior disciplinary history, the Board noted that appellant could have appealed those minor infractions to the Superior Court of New Jersey. *See Romanowski v. Brick Tp.*, 185 *N.J. Super*. 197 (Law Div.1982), *aff'd,* 192 *N.J. Super*. 79 (App. Div. 1983); *Hall v. Mayor and Director of Public Safety in Pennsauken Tp.*, 170 *N.J. Super*. 307 (Law Div. 1979), *rev'd on other grounds,* 176 *N.J. Super*. 229 (App. Div. 1980). Accordingly, based on the totality of the record including the prior minor disciplinary actions, and in consideration of the serious nature of the charge, the Board found that the 10-day suspension was too light of a penalty. The Board noted that an altercation with a subordinate employee, provoked by a supervisory employee, is a very serious matter. Therefore, the Board found that a 30-day suspension was the appropriate penalty and would serve as a warning to appellant that any future infractions may result in removal. The Board noted that, under the circumstances of the case, the Board could not sanction the termination of this employee who has no prior record of major discipline without allowing him the opportunity to remedy his deficiencies.

As to the layoff action, Mr. Campbell appealed the good faith of his layoff on the basis that it had been motivated by reasons other than economy or efficiency. Specifically, he maintained that he had been targeted for layoff by the Township's newly-elected administration so that it could replace him with a more favored employee. In addition, appellant stated that he had alerted DOP that another Township employee, Howard Johnson, had been assigned his former Superintendent of Public Works duties under the new job title of Acting Director of Public Works in violation of civil service rules. At the OAL hearing, a Personnel and Management Analyst with DOP testified that the results of a DOP-conducted classification survey indicated that Mr. Johnson's duties were consistent with appellant's title prior to the layoff, and based on these results, DOP had notified the Township that it must either vacate the position or appoint an individual from the special reemployment list which included appellant's name. However, the Township had taken no action.

Based on the above evidence, the ALJ found that appellant's layoff had been motivated by reasons other than those of economy and efficiency, and the Township laid off appellant to relieve the Township "of an employee with whom it was unhappy." Thus, the ALJ recommended that appellant be reinstated to the title of Superintendent of Public Works, with an award of back pay and counsel fees. Upon review, the Merit System Board affirmed the recommendation that appellant be reinstated with back pay.

N.J.A.C. 4A:2-2.12 provides for an award of reasonable counsel fees where an employee has prevailed on all or substantially all of the primary issues in an appeal. The Board concluded that appellant did not meet this standard in his disciplinary appeal since he only received a modification in penalty. The primary issues in any disciplinary appeal are the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super*. 121, 128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). However, the Board determined that since the layoff and disciplinary matters were consolidated and appellant prevailed in the layoff action, the appropriate action would be to pro rate appellant's counsel fees, and award him 50 per cent of his counsel fees.

Threat of Physical Violence Warrants Security Guard's Removal

In the Matter of Lynth Hassan
(Merit System Board, decided Dec. 16, 1997)

Appellant, Lynth Hassan, a Security Guard with the Newark School District, was removed on charges of conduct unbecoming a public employee and insubordination. Specifically, the appointing authority asserted that, in the presence of office staff, a student and the student's parent, appellant was abusive and used profane language toward a

fellow employee. Moreover, the appointing authority maintained that appellant persisted even after she was directed by a supervisor to refrain from such conduct.

At the hearing before the Office of Administrative Law, Christiner Carter-Betts, Principal of the Madison Avenue Elementary School, testified that, on January 26, 1996, while she was distributing payroll checks to school employees, appellant became angry and belligerent. Appellant stated, "I'm tired of your f---ing sh-- and I am going to f--- you up!" When Ms. Betts instructed appellant to refrain from using such language in the school, appellant lunged toward her. Ms. Betts then directed appellant to leave the building. When appellant refused, Betts called for assistance from Vice Principal, Ivan Holmes. Mr. Holmes then physically escorted appellant from the building.

Mr. Holmes corroborated Ms. Betts' testimony, adding that after words were exchanged between appellant and Ms. Betts, appellant followed her into her office yelling that she was "tired of the bitch harassing her and that she was going to bust her ass." After Mr. Holmes removed appellant from the building, he called security.

The appointing authority presented three witnesses, all employees of the school, who corroborated the testimony of Ms. Betts and Mr. Holmes. Appellant testified that, on January 26, 1996, she was upset about the amount of money contained in her paycheck. She admitted confronting Ms. Betts about the amount, which she felt was incorrect, and admitted using profane language, but denied threatening Ms. Betts.

Based on the above evidence, Administrative Law Judge Irene Jones (ALJ) sustained the charges against appellant. Specifically, as to the charge of conduct unbecoming a public employee, she found that appellant had caused a disturbance by directing profane language at the principal of the school. While the ALJ noted that appellant denied threatening Ms. Betts, she found that appellant was irate and belligerent and followed the principal into her office, thereby causing apprehension among those present that a physical altercation would ensue. The ALJ noted that appellant was employed as a security guard and that her duties consisted primarily of maintaining order at the school, a function which she found fundamentally at variance with appellant's conduct. As to the charge of insubordination, the ALJ found that Ms. Betts had instructed appellant to immediately cease using profane language and to leave the administrative office and that appellant had failed to obey these clear directives.

As to the issue of penalty, the ALJ found that the charges were extremely serious in nature, adding that appellant displayed no remorse or regret for her disruptive behavior. Moreover, the ALJ noted that appellant had been suspended on three prior occasions for excessive absenteeism, tardiness and being absent without leave, and had been placed in a 60-day probationary period. Therefore, the Merit System Board affirmed the recommendation of the ALJ to uphold the removal.

Physical Assault of Co-worker Warrants Removal

In the Matter of Gary Manageri
(Merit System Board, decided Mar. 24, 1998)

Appellant, Gary Manageri, an Electrical Mechanic with the N.J. Department of Transportation (DOT), was removed on charges of: 1) physically assaulting a co-worker, Suryakant Shah; 2) refusing to assist that co-worker in the unloading of a truck in response to an explicit request by that co-worker to provide such assistance; and 3) having knowledge of, but failing to report to the appropriate authority, the setting afire of that co-worker's locker.

At a hearing before the Office of Administrative Law, Administrative Law Judge John R. Tassini (ALJ) found that appellant and Mr. Shah, the victim, were part of a four-man work crew supervised by Daniel O'Callaghan. The other members of the crew were Kevin Addesso and Wesley McKoy. On the morning of June 24, 1993, appellant's crew was assigned to replace a worn cable which provided electrical power to a traffic sign located on an exit ramp of Route 24. Upon arrival at the worksite, appellant and Mr. Addesso proceeded to a junction box located at the upper portion of the exit ramp, while Mr. Shah and Mr. McKoy proceeded to a junction box at the lower portion of the exit ramp.

Appellant and Mr. Addesso, the two senior members of the crew, directed Mr. Shah and Mr. McKoy to remove the damaged cable from the conduit running between the two junction boxes, so as to clear a way for the new cable. While attempting unsuccessfully to remove the old cable from the conduit, Mr. Shah heard a noise and assumed that appellant and Mr. McKoy were moving the cable from their position at the upper junction box. Mr. Shah then yelled several times to appellant and Mr. McKoy to "push more." Appellant replied, "Are you telling me?" and proceeded to instruct Mr. Shah that if he could not do the work, he should return to the shop. Mr. Shah then told appellant that he should try to remove the old electrical line from the lower junction box. Appellant then crossed the exit ramp, approached Mr. Shah, and stated, "Are you telling me, Niggo?" Appellant pushed Mr. Shah backwards, causing him to fall against the guardrail. Mr. Shah then fell on the ground. Appellant knelt beside Mr. Shah and, holding the open blade of a knife against Mr. Shah's arm, asked him, "Do you believe in God?" After Mr. Shah responded in the affirmative, appellant returned to the upper junction box. Mr. McKoy and Mr. Addesso testified that they did not witness the altercation as they were occupied with the removal of the electrical cable at the time.

When Mr. O'Callaghan arrived at the worksite, Mr. Addesso approached him and stated, "Gary (appellant) clocked the Indian." Mr. O'Callaghan then noticed Mr. Shah sitting and asked him if anything was wrong, to which Mr. Shah responded, "I'll talk to you later." Upon the crew's return from the worksite to the DOT yard, Mr. O'Callaghan conferred with Mr. Shah, who indicated that appellant had treated him "badly." Mr. Shah also reported to Mr. O'Callaghan that he had injured his back and elbows during the attack by appellant. Mr. O'Callaghan referred Mr. Shah to a staff nurse, who examined Mr. Shah and recorded his allegations.

Upon observing a bruise-type mark on Mr. Shah's back, Mr. O'Callaghan transported Mr. Shah to a walk-in medical center, where Mr. Shah was examined by Ralph D'Agostino, M.D. Dr. D'Agostino diagnosed Mr. Shah's condition as contusions of the spine, knees and elbows and advised Mr. Shah to both refrain from his regular duties and take a prescribed course of medication. After several follow-up visits, Dr. D'Agostino recommended that Mr. Shah be placed on light duty.

On August 25, 1993, while working at the DOT yard, Mr. Shah requested that his co-workers assist in the unloading of heavy material from a truck. Appellant and Mr. Addesso refused to help Mr. Shah. Mr. McKoy provided the needed assistance. After unloading the truck, Mr. Shah proceeded to his locker, located in the garage, to change from his work clothes into street clothes. As Mr. Shah approached the garage, he observed appellant and smelled an acrid odor. Mr. Shah asked appellant about the odor, but appellant indicated that he smelled nothing unusual. When Mr. Shah opened his locker, he observed smoke and burned clothing and papers, as well as water and fire-extinguisher powder. Fire officials, the State Police and DOT investigators were dispatched to investigate.

With regard to the June 24, 1993 incident, appellant told DOT investigators that "there was some horseplay" after the crew finished the Route 24 job, but he denied that either he or Mr. Shah were on the ground, that he held a knife to Mr. Shah, or that he called Mr. Shah a racially derogatory name. As to the August 25, 1993 incident, appellant told DOT investigators that when he and Mr. Shah went to their lockers at the end of the workday, he (appellant) noticed powder at Mr. Shah's locker. Mr. Shah then noticed that his clothes were wet and the two proceeded together to the appropriate authority to report the incident.

Based on the above evidence, the ALJ sustained the charges against appellant of assaulting a co-worker, and refusing to assist a co-worker in the unloading of a truck in response to an explicit request by that co-worker to provide such assistance. The ALJ dismissed the remaining charge of having knowledge of, but failing to report to the appropriate authority, the setting afire of a co-worker's locker. Specifically, he found that on June 24, 1993, appellant referred to Mr. Shah, who is dark-skinned, as "Niggo," pushed Mr. Shah hard enough to cause him to fall and injure himself and held a knife to Mr. Shah. Moreover, he found that appellant had refused to assist Mr. Shah in the unloading of a truck. However, as to the third charge, the ALJ found that the appointing authority had failed to prove by a preponderance of the evidence that appellant failed to report the fire in Mr. Shah's locker to the appropriate authority.

As to the issue of penalty, the ALJ found that, although appellant possessed ten years of service, with no history of disciplinary action, the use of a racially derogatory term, coupled with the assault of a co-worker with a knife, constituted sufficiently

egregious conduct to justify the penalty of removal. As to the charge of refusing to assist Mr. Shah in the unloading of a truck, the ALJ found that the appointing authority's imposition of major discipline was inappropriate. Therefore, on the sole basis of the first charge, that of assaulting a co-worker, the ALJ recommended that the penalty of removal be upheld. Upon review, the Merit System Board affirmed the recommendation of the ALJ.

Suspension for Altercation with Co-worker Reversed
In the Matter of Larry Walker
(Merit System Board, decided Oct. 7, 1997)

Appellant, Larry Walker, a Carpenter with the Newark Housing Authority, was suspended for 20 days on charges of committing an act of violence, conduct unbecoming a public employee and violating the Newark Housing Authority Code of Ethics. Specifically, the appointing authority asserted that appellant and a co-worker, Rashid Savage, were involved in an altercation which began in the street and culminated in an office.

The matter was transmitted to the Office of Administrative Law, and after a hearing, Administrative Law Judge Maria Mancini LaFiandra (ALJ) concluded that the appointing authority had not met its burden of proof to sustain the charges. The ALJ found that Mr. Savage followed appellant into the building and the verbal altercation continued witnessed by three female employees. At some point, appellant was led into a small office and the door was locked behind him by one of the female employees. The ALJ also found that at some point during their exchange, Savage brandished a knife, and appellant had a box cutter in his hand, although it was not clear that he opened the blade or pulled it out prior to Mr. Savage's appearance.

The ALJ concluded that appellant, by allowing himself to be maneuvered into a locked office, reasonably sought to retreat in the face of a perceived threat with a weapon. Therefore, based on her finding that appellant was not the provocateur in the incident, the ALJ concluded that the appointing authority had not met its burden of proof. The ALJ further determined that the appointing authority failed to sustain the charge of conduct unbecoming a public employee, based on a violation of the Newark Housing Authority Code of Ethics, since it had not presented evidence as to the violation at issue. However, although the ALJ determined that the appointing authority failed to sustain the charge of unethical conduct, she recommended that a five-day suspension be imposed because appellant's behavior had placed his co-workers in jeopardy.

The Merit System Board noted that in appeals of major disciplinary action, the burden of proof rests with the appointing authority. *See N.J.A.C.* 4A:2-1.4(a). In the absence of a preponderance of credible evidence to support the charges, the Board concluded that the appointing authority had not met its burden of proof. Upon review of the record, the Board concurred with the ALJ's finding that appellant did not engage in unlawful conduct and that he was not the provocateur of the incident in question. The Board found that there was no evidence in the record that Mr. Walker continued the altercation once he had retreated to the small office. Rather, the three female employees called for security and the incident was ended. The Board found that the record did not support the ALJ's conclusion that appellant, by his actions, played an active role in endangering his co-workers. Therefore, the Board concluded that the charges should be dismissed and no penalty should be imposed. The Board also awarded back pay, seniority and benefits for the period of the suspension and counsel fees for appellant's attorney.

Safety Considerations Override Firefighter's Right to Exercise Freedom of Religion

In the Matter of Abdush-Shahid Yasin

(Merit System Board, decided May 5, 1998)

Appellant Abdush-Shahid Yasin, a Firefighter for the City of Newark Fire Department, was suspended for 12 days. He was charged with violation of a Department General Order which provides that facial hair on the chin or lower jawbone areas is prohibited, and violations of Department Rules and Regulations which provide that members of the Fire Department are subject to orders issued by Superiors, and are required to conform to the Rules and Regulations and General Orders of the Department. Specifically, the appointing authority asserted that appellant refused to obey a lawful order to shave his beard.

The matter was transmitted to the Office of Administrative Law (OAL) for a hearing. Administrative Law Judge Edith Klinger (ALJ), upon the City's request for summary judgment, and appellant's failure to appear at the hearing, upheld the charges on the basis of the briefs and documents provided by the City. The City maintained that the presence of a beard while wearing a respirator face piece, such as the Scott Presur-Pak 2.2 self-contained breathing apparatus (SCBA), creates a safety hazard, in that facial hair interferes with the creation of a secure seal between the mask of the apparatus and the face of the wearer. The ALJ concluded that the standards for use of the SCBA prohibit facial hair, and that if appellant were to be exposed to toxic fumes because his face piece were to leak, he could become incapacitated and fail to carry out his duties during moments of grave danger. However, upon review, the Merit System Board (Board) concluded that the ALJ had rendered an initial decision without the benefit of appellant's position on the issues of medical and religious accommodation, and remanded the matter to OAL to allow appellant to proffer evidence.

On remand, appellant presented evidence that he is a believer in the Islamic faith which requires him to wear a beard and that he suffers from folliculitis, a skin condition which is aggravated by frequent shaving. He also presented testimony that other City Firefighters were allowed to wear beards for medical reasons. The City did not present evidence on remand. The ALJ concluded that, under the State Constitution, to burden the free exercise of religion, the government must show that its actions are in furtherance of a compelling governmental interest and that it employed the least restrictive means of achieving that interest. The ALJ set forth that she observed appellant conduct a demonstration of the use of the Scott 45 SCBA then used by the City. She concluded that appellant, who had a closely-trimmed beard, put on the mask and demonstrated that he was able to get a good seal around his face because when he gently released the edge of the mask, the sound of escaping air was "loud enough to fill the hearing room." She also noted that the Scott 45 SCBA was not the SCBA described in the first hearing, and there was no information as to whether the same safety considerations apply to the Scott 45. Accordingly, she dismissed the charges against appellant, concluding that "because of changes in technology," there was no apparent safety hazard created by using the Scott 45 SCBA in the presence of short facial hair.

Upon review, the Board noted the precedental value of the case for public safety employees, and finding that the record was deficient, again remanded the matter to OAL for presentation of further evidence, including expert testimony, as to the safety standards of the equipment at issue. The Board additionally found, in light of the ALJ findings that the safety standards provided by the City were outdated, that the record did not establish whether the same safety considerations apply to the Scott 45 SCBA. The Board also directed the ALJ to address appellant's contention that the City did not uniformly apply the prohibition against facial hair.

On remand, expert testimony presented that the air tank used with the Scott 45 SCBA is rated as having a half-hour's supply of air; however under firefighting conditions, the tank may last no more than 20 minutes. Additionally, a slow escape of air from under the seal of the mask, which would not produce the loud burst of sound heard at the previous hearing but rather a silent reduction of available air in the tank, could limit the Firefighter's ability to remain in a burning structure to 10 minutes or less. Facial hair can create a number of slow leaks where the hairs interrupt the seal, and due to this loss of air, by the

time the low-air alarm goes off, the Firefighter might have only seconds of air left to get out of the dangerous environment to safety. This type of quick escape is not always possible under the conditions which Firefighters work. Further, since the low positive pressure inside the mask is replaced by a negative pressure created by rapid respiration, if the wearer's respiration is faster than anticipated by the manufacturer, even a small leak in the seal would cause toxic gasses to be drawn into the mask. Facial hair, glasses, addition or removal of dentures, facial deformities or facial changes resulting from a loss of weight can cause leaks in the seal.

Testimony was presented that Occupational Safety and Health Administration (OSHA) regulations provide that respirators should not be worn when conditions, such as a growth of beard, prevent a good face seal. The New Jersey Public Employees Occupational Safety and Health Program has adopted the OSHA position as to the incompatibility of facial hair and the safe use of respirators. The National Fire Protection Association (NFPA) guidelines prohibit the use of an SCBA face piece for its members with a beard or facial hair that could interfere with the operation of the unit, regardless of the specific fit test measurement that can be obtained under test conditions. NFPA guidelines also provide that an inflammatory skin disease, which precludes the good fit of an SCBA or prevents shaving, can result in the inability to properly wear protective clothing.

Qualitative and quantitative methods are available to determine the effectiveness of the seal achieved. However, because of the expense involved, most Fire Departments, including Newark, do not use the more quantitative method which relies upon a monitoring device built into the mask to detect and quantify leakage. The qualitative test, which is more subjective, depends on the wearer of the SCBA detecting and reporting the presence of banana oil or smoke introduced in the environment. The ALJ found that at the hearing, appellant could not duplicate the correct seal demonstrated by a clean-shaven individual.

The ALJ found that the City regulations prohibiting facial hair in the area under the seal of the mask are in accord with nationally-accepted safety standards, and are, therefore, reasonable. Obtaining a proper, safe seal around the mask of an SCBA is dependent on many variables, including hair texture, rate of growth, facial expression, movement, and weight, and it would require almost constant monitoring to determine if a bearded Firefighter is in danger of SCBA failure due to leakage. The creation of individual exceptions to the prohibition would compound the monitoring problem, and the achievement of one successful seal by a bearded Firefighter, as verified by any recognized test, is not dispositive of the issue of safety. She also found that the issue of appellant's personal safety is irrelevant because his incapacitation at a fire might jeopardize the safety of his fellow Firefighters and the citizens he is supposed to protect. The fact that the City tolerates the wearing of a beard by others is also not relevant, since such an individual may serve in a staff, rather than a line, position and not be required to wear an SCBA. Further, based on the lack of medical documentation that appellant's skin condition prevents him from shaving once a day, she found that this condition does not prevent him from serving as a Firefighter.

Based on the overwhelming issue of safety, the ALJ concluded that the Fire Department rule is in furtherance of a compelling governmental interest. She further concluded that based upon the proofs demonstrating the need for almost continuous monitoring of the fit of the SCBA masks, there is no less-restrictive means of insuring the safety of Firefighters than the total prohibition of facial hair on any part of the face where it will interfere with the seal of the mask. Given this fact, the rule does not unduly burden appellant's free exercise of religion. Accordingly, the ALJ upheld the charges and the penalty of a 12-day suspension. Upon review, the Merit System Board affirmed the recommendation of the ALJ.

OF PERSONNEL INTEREST

Workers Against Violence Efforts.....The WAVE Project

By: Elizabeth Kaye, HRDI

Workplace Violence! We hear, read and see the horror stories in the media almost every day...from schools to businesses. Its impact extends to not only the victim and perpetrator, but to their families, friends, co-workers, and employers. Workplace violence is one of the most significant and pervasive problems in the American workplace today. According to OSHA, homicide has become the second cause of death in the workplace. Statistics show that in today's current climate, one in four workers will be harassed, intimidated, threatened, or attacked on the job.

As a result of a 1996 Department of Personnel study on workplace violence, Governor Whitman recognized the need for both awareness and action against workplace violence by public employees. She signed Executive Order No. 49. This order established a "zero tolerance" policy for any acts of workplace violence by or against employees, property or installations in New Jersey government.

As part of this project, HRDI in cooperation with the Communications Workers of America developed a workplace violence prevention and response training program. It is now being implemented in all State government agencies, and is available to municipalities and counties.

A major goal of the project is to establish an attitude of concern and open lines of communication among all state employees, as well as to provide training about prevention and response strategies to workplace violence. In order to do this, HRDI applied for and received a grant from the Department of Labor's Workforce Development Partnership Program.

The project includes: publishing and distributing a booklet entitled, *Working Toward a Secure Workplace*; a kick-off teleconference for over 1,040 managers held in August, 1997 that was also telecast to the State of Pennsylvania's Governor's office; two basic courses, one for managers and one for employees (trained 440 trainers); and two specialty courses. The specialty courses, *Crisis Management Team Leader Role (trained 108)* and *The Human Resource Specialist Role in Preventing Workplace Violence (trained 150)* were offered by Joseph Kinney, Executive Director of the non-profit National Safe Workplace Institute. He was recently quoted in the *Los Angeles Times* stating, "So far only one state has addressed the issue of workplace violence and mandated training for all of its government employees. New Jersey is the only state that has grappled with this dangerous phenomenon. I just finished training senior government managers at a two-day seminar." HRDI will continue to offer these courses, as well as other courses in the areas of interpersonal relationships, communications, conflict resolution, mental health and substance abuse. Also, CD-ROM and video-workbook versions of the basic course for employees will soon be available.

Feeling and being safe at work is the result of the continuous efforts by all of us in the workplace. Although no single strategy is appropriate for all work sites, heightened awareness of warning signs, a knowledge of environmental factors and organizational culture, and having a crisis management plan in place that has been articulated to all employees can not only save lives, but can also save taxpayers' money.

FROM THE COURT

Following are recent Supreme Court and Appellate Division decisions in Merit System cases. As the Appellate Division opinions have not been approved for publication, their use is limited in accordance with *R.*1:36-3 of the N.J. Court Rules.

This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized.

Court Upholds Pilot Programs Based on Goals of the Civil Service Act

Communications Workers of America, AFL-CIO v. New Jersey Department of Personnel
154 *N.J.* 121 (1998)

After conducting public hearings in 1994 and 1995 on the State's civil service system, the Commissioner of Personnel started two pilot programs for use in determining the eligibility of candidates for civil service appointments. The first program increased from three to ten the number of names from which the appointing authority could select a candidate from a civil service list. The second extended "working test periods" from four to twelve months. The Commissioner relied on a statute, *N.J.S.A.* 11A:2-11i, in promulgating the pilot programs.

The Communications Workers of America (CWA) objected to the programs. In response, the Commissioner stated that the pilot programs were a proper exercise of her authority under Section 11i. CWA appealed the Commissioner's determination to the Appellate Division, which struck the programs down as exceeding the Commissioner's statutory authority, as being inconsistent with express provisions of existing statutes, and as having been adopted without complying with rule-making requirements.

The Supreme Court granted the petition for certification filed by the Department of Personnel (DOP).

HELD: The purposes underlying the Civil Service Act provide the Commissioner of Personnel with sufficient standards to guide her exercise of authority under *N.J.S.A.* 11A:2-11i. The pilot programs established by the Commissioner are valid, subject to the constraints of the Act.

1. The goal of the Civil Service Act is to secure the appointment and advancement of employees based on merit and abilities. When establishing pilot programs such as those under review, the Commissioner may not act contrary to the goals of the Act. These goals sufficiently channel the Commissioner's discretion, as does the one-year limit on the pilot programs and the opportunity for judicial review.

2. In seeking to effectuate the legislature's intent, the Court views the Act as requiring standards for the employee appointment and selection process. The "Rule of Three" (permitting any candidate from among the top three on the list to be selected for the position) can be modified appropriately during a test period. Even with a "Rule of Ten" under the pilot program, the appointment must still be merit-based. In addition, the appointing authority must still provide reasons why a higher-ranked candidate was not selected. Valid reasons can include experience, education, training, or superior communication, managerial, or other skills that are not readily reflected in the examination scores. Furthermore, a Rule of Ten provides the appointing authority with a greater ability to ensure equal employment opportunity and to create a more diverse workplace environment.

3. The Working Test Period pilot program retains a reasonable probationary period. Extending the period from four to twelve months enables the appointing authority to make more informed decisions on appointments and affords appointees

more time to demonstrate their ability to perform the responsibilities of their new position.

4. The one-year limit on pilot programs under Section 11i begins to run when the Commissioner establishes a program. To avoid confusion, the Commissioner should set a date by which the appointing authority may elect to participate in such a program. The Court also notes that appointing authorities who request a pilot program are obliged to consult with affected "negotiations representatives" before submitting the proposal. This does not mandate negotiations, but does require discussion.

5. In light of the statutory standards expressed in the underlying policy of the Act, the Commissioner did not exceed her authority by trying out pilot programs without first conducting rulemaking hearings under the Administrative Procedure Act. She can, however, conduct such hearings if she finds that they would aid her in the exercise of her statutory authority.

The judgment of the Appellate Division is REVERSED.

JUSTICE HANDLER filed a separate dissenting opinion. He would affirm the judgment of the Appellate Division substantially for the reasons expressed by that court. Section 11i and *N.J.A.C.* 4A:1-4.3 permit the Commissioner to establish pilot programs by ignoring not only the requirements of Title 11A but also the Department of Personnel's own rules.

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Police Officer Eligible for Counsel Fees Under *N.J.S.A.* 11A:2-22

Oches v. Township of Middletown Police Dept.

____ *N.J.* ____ (1998)

The question addressed in this appeal is whether a police officer can be awarded attorney's fees by the Merit System Board (the Board) for representation in a disciplinary proceeding under the general authority of a statute applicable to all public employees, even if such an award is not authorized under a provision applicable to police officers only.

In June 1993, Middletown filed disciplinary charges against Oches, then a Lieutenant in the Township Police Department. Middletown alleged that Oches improperly tape recorded his promotion interview in violation of Middletown's General Order #80-2, which regulates the use of electronic surveillance equipment by police officers while in the performance of their duties. Oches was demoted to the position of Sergeant. He appealed to the Board and a hearing was held before an Administrative Law Judge (ALJ).

The ALJ concluded that General Order #80-2 was not applicable, since at the time of the interview, Oches was not performing his official duties. The Board thereafter adopted the ALJ's decision, dismissed the charges against Oches, reinstated him to the position of Lieutenant, and awarded him counsel fees.

Middletown appealed. The Appellate Division affirmed the Board's dismissal of the charges against Oches, but reversed the award of counsel fees. It held that *N.J.S.A.* 11A:2-22, the statute under which Oches had been awarded attorney's fees, was in conflict with *N.J.S.A.* 40A:14-155, which specifically addresses the award of fees to a police officer in disciplinary matters. The Appellate Division interpreted the latter provision to preclude the award of attorney's fees and, since it was the more specific of the two statutes, determined that it controlled.

The Supreme Court granted the petitions for certification filed by Oches and the Board. It denied Middletown's petition challenging the Board's dismissal of the charges against Oches.

HELD: The statute that specifically addresses the award of counsel fees in disciplinary proceedings for police officers, *N.J.S.A.* 40A:14-155, does not preclude the Board from exercising its statutory powers under *N.J.S.A.* 11A:2-22 to allow reimbursement for attorney's fees under circumstances that are not inconsistent with the legislative purpose of *N.J.S.A.* 40A:14-155. Since this is such a case, the Board's award of fees to Oches must be sustained.

1. When considering statutory provisions that relate to the same or similar subject matter, every attempt is made to interpret them harmoniously. It is clear that *N.J.S.A.* 40A:14-155 does not authorize counsel fees to Oches, since that provision authorizes fees only to officers charged with infractions arising out of the lawful exercise of police powers in furtherance of their official duties.

2. The inquiry, however, does not end there. The statutes are not necessarily in conflict. There is no indication that the Legislature intended *N.J.S.A.* 40A:14-155 to deny reimbursement of fees to officers who prevail on disciplinary charges arising out of allegations of relatively benign off-duty conduct that does not constitute a perversion of official duties. Oches was not acting in the performance of his official duties when he taped his promotion hearing. The Board's award of counsel fees to Oches therefore does not undermine the legislative objective reflected in *N.J.S.A.* 40A:14-155. There is no conflict between the statutes on these facts. The Board's award of fees to Oches was authorized under *N.J.S.A.* 11A:2-22.

The judgment of the Appellate Division is REVERSED.

JUSTICE GARIBALDI filed a separate dissenting opinion. She is of the view that *N.J.S.A.* 40A:14-155 is intended to strictly circumscribe the instances in which a police officer could be reimbursed for the costs of defense and is therefore in conflict with *N.J.S.A.* 11A:2-22. Given this conflict, the more specific statute, *N.J.S.A.* 40A:14-155, must prevail, and Oches should be denied counsel fees.

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Suspension of Firefighter Upheld for Racial Epithet Which Was Not Constitutionally Protected Speech
Karins v. City of Atlantic City
152 *N.J.* 532 (1998)

The issue raised in this appeal is whether the First Amendment prevents a municipality from disciplining an off-duty firefighter for directing a racial epithet at an on-duty police officer.

Karins was stopped at Atlantic City's annual "Harborfest" celebration on suspicion of a DWI offense after a parking attendant informed an Atlantic City police officer that Karins appeared intoxicated. Karins immediately identified himself as a firefighter with the Atlantic City Fire Department (A.C.F.D.). The police officer observed that Karins staggered, slurred his speech, and smelled of alcohol. Despite these observations, the officer, in the exercise of his discretion, decided not to subject Karins to any sobriety tests.

Another police officer who is African-American approached the scene to provide backup assistance. He greeted his fellow police officer, who is white. Karins turned to him and stated, "Oh no, don't start that nigger shit!" and walked away. Karins was not arrested or charged with any offense that night. Although upset that another City employee would use a racial epithet while speaking to him, the African-American officer had no intention of including the racial epithet in his official incident report. Within a few days of the incident, however, the police officers' superiors asked them to supplement their reports to include the epithet.

Karins was served with a notice of disciplinary action, charging him with the following misconduct: (1) conduct unbecoming a public employee; (2) violation of A.C.F.D. rules by not conducting oneself in the customary rules of good behavior observed by law abiding and self respecting citizens; (3) violation of A.C.F.D. rules by conduct for which one may be arrested; (4) repeated violation of A.C.F.D. rules by a course of conduct indicating little or no regard for responsibility as a member of the A.C.F.D.; and (5) violation of A.C.F.D. Operational Procedure #105, the Department's policy against discrimination, harassment and hostile environments in the workplace. The repeat offender charge was based on Karins's prior ten-day suspension for calling an African-American firefighter a "coon." Karins's conduct in that case contributed to the promulgation of Operational Procedure #105.

The Personnel Director for the City held a disciplinary hearing, and found Karins guilty on all five charges. Karins was suspended without pay for 48 days. Karins requested and received a *de novo* review that was conducted before the Office of Administrative Law. The ALJ, without addressing the constitutional issues, concluded that the City was impermissibly attempting to discipline Karins for a violation of an unwritten speech code of which Karins did not have adequate notice. The ALJ held that the City failed to sustain its burden of proof on all charges, and that Operational Procedure #105 applied solely to employees in the workplace during working hours.

The Merit System Board adopted the factual findings and legal conclusions of the ALJ. The Appellate Division affirmed in an unpublished opinion, holding that there was "nothing unreasonable, arbitrary, or capricious about the agency's decision." The Court granted certification.

HELD: The regulations under which Karins was charged are not unconstitutionally vague or overly broad; the racial epithet uttered by Karins was not constitutionally protected free speech; and the charges against Karins were sustained by a preponderance of the evidence. The Merit System Board's decision dismissing the charges therefore was arbitrary and capricious.

1. The Court rejects Karins's argument that the regulations are void for vagueness. The A.C.F.D. regulations contain specifically enumerated offenses as well as catch-all provisions. It would be impossible for the A.C.F.D. to predict every instance of proscribed conduct. Constitutionally protected,

conduct-related speech is impliedly excluded from the regulations. Furthermore, Karins knew that the use of racial slurs was prohibited because he had been disciplined previously for making such remarks.

2. The regulations are not overbroad. They are clearly aimed at conduct rather than speech. Constitutionally protected conduct, including speech, is implicitly excluded from that proscription.

3. Applying the standard established by the U.S. Supreme Court in *Pickering v. Board of Education,* 391 *U.S.* 563 (1968) for determining when conduct-related speech in public-sector employment is constitutionally protected, the Court concludes that the discipline here does not infringe on Karins's freedom of speech. The racial slur here was not remotely related to a matter of public concern. And, the City's interest in maintaining order, discipline, harmony, and a professional working relationship between the police and fire departments substantially outweighs Karins's right to make abusive, insulting, racially motivated comments.

4. Because the agency's decision was based on a consideration of inappropriate factors, the Court must make a *de novo* assessment of whether the charges have been sustained by a preponderance of the evidence. After identifying himself as an A.C.F.D. employee, Karins used a racial epithet against a police officer who was in the course of performing his duties and in public, without regard to who may have witnessed the incident. The Court finds that by a preponderance of the evidence such conduct constituted "conduct unbecoming." The Court also finds that Karins's conduct constitutes a repeat violation of the A.C.F.D.'s rules. The Court also concludes that the City established by a preponderance of the evidence that Karins engaged in conduct for which he could have been arrested, since probable cause existed for a DWI arrest. Finally, the Court concludes that the racial epithet uttered by Karins is covered by Operational Procedure #105, given the working relationship required between City police officers and firefighters, and the capacity of the slur to exacerbate racial tensions among such employees.

The judgment of the Appellate division is REVERSED.

Good Cause Standard for Rule Relaxation Upheld

I/M/O Intermittent Employees, Department of the Treasury
A-3032-96T2 (App. Div., March 13, 1998)

The Communications Workers of America (CWA) appeals from a decision of the Merit System Board finding good cause for the relaxation of *N.J.A.C.* 4A:3-3.8(b)(3). That regulation required that intermittent employees be recalled from furlough on the basis of seniority. The CWA argues that: (1) *N.J.A.C.* 4A:1-1.2(c), which authorizes the Board to relax a regulation for good cause, does not contain adequate standards for the exercise of that power, (2) the Board was required to follow the rule-making requirements of the Administrative Procedure Act (APA) before it suspended the seniority requirement, (3) the Board violated the employees' property rights, and (4) the Board's finding of good cause is not supported by the evidence. We reject these arguments and affirm the Board's decision.

I.

The facts are not in dispute. On November 14, 1996, the State Treasurer petitioned the Board for relaxation of that portion of *N.J.A.C.* 4A:3-3.8(b)(3) that required the recall of furloughed intermittent employees on a seniority basis. An intermittent employee is one whose job is "characterized by unpredictable work schedules and which do not meet the normal criteria for regular, year-round, full-time or part-time assignments." *N.J.A.C.* 4A:3-3.8(a). Such employees "may be subject to furlough when due to managerial needs, [they] cannot be scheduled for work within the next week." *N.J.A.C.* 4A:3-3.8(b). Furloughs are accomplished in reverse order of seniority. *N.J.A.C.* 4A:3-3.8(b)2. Recalls from furlough are accomplished on a seniority basis. *N.J.A.C.* 4A:3-3.8(b)3.

The Treasurer explained in his petition that the Division of Taxation routinely employs intermittent workers to assist in processing tax returns for several months during the year. Many of these employees also hold full-time positions with the State. The Treasurer was concerned that such employees could claim overtime compensation where their dual employment with the State would

cause them "to exceed the number of hours established for their primary, full-time positions." The Treasurer noted that other intermittent employees who do not hold positions in State employment would not have a claim for overtime compensation, and their morale would obviously be impaired were they to be paid at a lower rate for the identical work. The Treasurer observed that substantial costs would be incurred if intermittent employees holding other State positions were required to be recalled from furlough because of seniority. He added that a significant administrative burden would be imposed on centralized payroll departments to verify each week whether intermittent employees had worked full-time at their other State positions and, therefore, had a claim for overtime compensation. The Treasurer thus sought relaxation of the regulation requiring that intermittent employees be recalled from furlough on a seniority basis.

A copy of the Treasurer's petition was served upon the CWA. The CWA thereafter objected to the Treasurer's application. The CWA agreed that intermittent employees holding other State positions would be required by the Fair Labor Standards Act to be paid at an overtime rate, while other intermittent employees would have no such claim. The CWA nevertheless protested that relaxation of the regulation's seniority provision would improperly circumvent the rights of intermittent State employees.

On December 23, 1996, the Board rendered its decision finding good cause to relax *N.J.A.C.* 4A:3-3.8(b)(3) "to allow the Department of the Treasury to recall only those intermittent employees who do not hold full-time, primary employment with State agencies." The Board mandated that this rule relaxation would be for a period not exceeding one year, during which time the Department of the Treasury could petition for amendment of the rule in question. Citing the "astronomical" cost of paying intermittent employees at an overtime rate and the administrative burdens attendant to such a course, the Board found good cause for a temporary suspension of the seniority provision contained in the regulation.

II.

On January 20, 1998, during the pendency of this appeal, the Board adopted a new regulation exempting from the recall provision all "[e]mployees who hold full-time primary employment in State service." 30 *N.J.R.* 382. Adoption of this regulation moots most, if not all, of the issues raised by the CWA's appeal.

To put the matter at rest, we add the following brief comments. Initially, we are satisfied that *N.J.A.C.* 4A:1-1.2(c), authorizing the Board to relax its rules "for good cause," provides a sufficiently precise standard to guide the administrative agency in exercising its discretionary powers. *In re Allen*, 262 *N.J. Super.* 438, 443 (App. Div. 1993); *see also In re Musick*, 143 *N.J.* 206, 219 (1996). "Good cause" is a familiar standard in the law and is used in a variety of legal contexts. *See, e.g.*, *R.*2:9-2 (extension may be granted by court for good cause). In this case, we are convinced the criterion of good cause constitutes an appropriate regulatory standard. *Cf. Township of Mount Laurel v. Public Advocate*, 83 *N.J.* 522, 532-33 (1980) ("public interest" standard is sufficiently definite); *Trap Rock Indus., Inc. v. Kohl*, 59 *N.J.* 471, 483-86 (1971) ("moral responsibility" is sufficiently clear standard), *cert. denied*, 405 *U.S.* 1965, 92 *S.Ct.* 1500, 31 *L.Ed.* 2d 796 (1972).

The new regulation was adopted pursuant to the requirements of the APA. We, thus, need not tarry in rejecting the CWA's claim that relaxation of *N.J.A.C.* 4A:3-3.8(b)3 could only be accomplished by rule-making. We merely note that *N.J.A.C.* 4A:3-3.8(b)(3) was suspended pursuant to a duly adopted waiver regulation in order to permit the Board to engage in rule-making without prejudicing the public interest. *See SMB Assocs. v. New Jersey Dep't of Envtl. Protection*, 264 *N.J. Super.* 38, 55-58 (App. Div. 1993), *aff'd on other grounds*, 137 *N.J.* 58 (1994).

We also reject the CWA's claim that relaxation of the regulation violated the State employees' property rights. Our Supreme Court has observed that "the terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligation, and hence may be changed except, of course, insofar as the State Constitution specifically provides otherwise." *Spina v. Consolidated Police and Firemen's Pension Fund Comm'n,* 41 *N.J.* 391, 400 (1964). Intermittent employees cannot validly claim a property right in the continued existence of *N.J.A.C.* 4A:3-3.8(b)(3). Moreover, their interest in being recalled for second jobs with the State is far outweighed by the public interest in controlling costs. *State Troopers Fraternal Ass'n of N.J., Inc. v. New Jersey*,

149 *N.J.* 38, 57 (1997). The State has a paramount interest in budgetary control. *Ibid.*

Finally, the Board could reasonably have found on the record before it that "good cause" existed for relaxation of the seniority requirement. The excessive cost of paying overtime rates, the administrative burden that would be imposed in certifying combined hours of work, and the evident unfairness of applying two levels of compensation for identical work clearly justified the Board's conclusion.

Affirmed.

Reasonably Foreseeable Aggravation of Preexisting Condition Precludes SLI Benefits

In the Matter of Nan Long-Seavey, New Jersey Department of Health
A-652–96T1 (App. Div. April 27, 1998)

Plaintiff Nan Long-Seavey appeals from the final administrative action of the Merit System Board (Board) which denied a request for reconsideration of an earlier denial of sick leave injury (SLI) benefits. We affirm.

Nan Long-Seavey is a Public Health Representative II for the New Jersey Department of Health. On March 22, 1995, she suffered a work-related injury in an automobile accident while traveling to a field audit. She sustained injuries to her back and neck. She sought SLI benefits for 81.5 hours alleging that this time reflected an accumulation of hours for medical visits in the weeks that followed the accident. The appointing authority denied her request for SLI benefits.

Long-Seavey appealed to the Board. On November 20, 1995, the Board issued a denial of the appeal concluding that because Long-Seavey had a history of neck and back problems and was aware that her job involved considerable travel, "it was reasonably foreseeable that she would injure her neck and back if involved in another motor vehicle accident." The Board also found that "[w]hile [Long-Seavey] claims that her injury is a direct result of the March 22, 1995 accident, she has failed to submit any medical documentation which establishes that her injury would not have occurred but for the March 22, 1995 accident." Additionally, the Board concluded, relying on *N.J.A.C.* 4A:6-1.6(b)3. that Long-Seavey was not entitled to SLI benefits if she aggravated a preexisting work-related injury because it is not the purpose of the SLI program to award benefits to an employee indefinitely or for recurring periodic disability and reinjuries after a one-year period. Long-Seavey did not appeal that decision.

Almost ten months later, Long-Seavey filed a request for reconsideration. The Board denied the reconsideration because it found that: (1) she failed to submit any new evidence or additional information which would change the outcome of the decision or establish that a clear material error occurred in the original determination; (2) the supplemental medical evidence submitted failed to indicate that her injuries would not have occurred but for the March 22, 1995 accident and that her injuries were separate and distinct from a prior injury; and (3) the fact that she received workers' compensation benefits did not establish her entitlement to SLI benefits because the SLI program is a distinct and limited program separate from workers' compensation.

Long-Seavey had a long history of neck and back problems prior to this accident. Between 1981 and 1990, she was involved in four motor vehicle accidents, all of which resulted in injuries to her neck and back. The first accident was work-related. She received a workers' compensation award. The second automobile accident, which occurred in 1985, was also work-related. Three years later, her chiropractor physician diagnosed that the 1985 accident caused a spinal injury which resulted in a premature, yet permanent degeneration to the C5-6 intervertebral disc. On August 21, 1989 and December 24, 1990, Long-Seavey injured her neck and back as a result of two non-work-related motor vehicle accidents.

In April 1993, Long-Seavey requested reassignment to a position that required less field travel. She submitted medical documentation delineating her difficulty in traveling frequently and for long distances. The request for reassignment was granted. However, eighteen months later, she accepted a position off a special

reemployment list which required considerable travel.

On appeal, Long-Seavey contends that: (1) the Board's determination miscontrues *N.J.A.C.* 4A:6-1.6(c)2.; (2) an auto accident is not an event which appellant should have reasonably foreseen to aggravate her preexisting injury; (3) the Board's decision penalizes appellant for a prior workplace accident; (4) SLI benefits should be granted to appellant under *N.J.A.C.* 4A:6-1.6(c)4.; and (5) the public policies of the State, which promote worker safety and fair compensation, will be severely undermined if the Board's decision is allowed to stand. We disagree.

SLI benefits afford state employees continued pay during periods of disability, without the necessity of using accumulated sick leave time. The relevant section of the Civil Service Act, *N.J.S.A.* 11A:6-8 provides the authority for paid leaves of absence to State employees for work-related injuries or illnesses, subject to the regulations adopted by the Board. The Board has adopted *N.J.A.C.* 4A:6-1.6(c)2. which provides that in order to be eligible for SLI benefits,

> (c) The disability must be due to an injury or illness resulting from the employment.
>
> * * *
>
> 2. Preexisting illnesses, diseases and conditions aggravated by a work-related accident or condition of employment are not compensable when such aggravation was reasonably foreseeable.

When an employee is not eligible for SLI benefits, the employee must use accumulated sick leave or take advantage of benefits afforded by the Workers' Compensation Act, *N.J.S.A.* 34:15-1 to -142 or the Temporary Disability Benefits Law, *N.J.S.A.* 43:21-25 to -56. Thus, the SLI program provides an additional benefit to state employees beyond workers' compensation benefits, temporary disability benefits or ordinary sick leave. The eligibility for SLI is consequently construed narrowly. *See Morreale v. New Jersey Civil Service Commission,* 166 *N.J. Super.* 536, 540 (App. Div. 1979), *certif. denied,* 81 *N.J.* 275 (1979).

The first contention is that the Board misconstrued *N.J.A.C.* 4A:6-1.6(c)2. This issue was raised on the initial appeal to the Board. Long-Seavey did not appeal that decision. She may not do so in a request for reconsideration. The Board may reconsider its prior decision upon a showing that "a clear material error has occurred" which would change the outcome. *N.J.A.C.* 4A:2-1.6(b). No such showing has been made here. Moreover, the Board found that Long-Seavey had a preexisting back injury, was aware that her position involved considerable field travel and thus, should have foreseen that any automobile accident would aggravate her condition. This is sufficient to render her ineligible for the narrowly construed, additional benefits that the SLI program provides. Under a traditional tort analysis, a tortfeasor is responsible for the aggravation of a preexisting injury. However, a much stricter standard, set by regulation, applies to SLI eligibility. *N.J.A.C.* 4A:6-1.6(c)2. and (c)4.

The second contention is that an automobile accident is not a reasonably foreseeable event that will cause an aggravation of a preexisting injury. However, in this case, Long-Seavey sought a reassignment to a position that required less field work for precisely that reason. Her chiropractic physician noted in support for her reassignment request that driving by itself caused an acute aggravation of her back problem.

Long-Seavey relies on *N.J.A.C.* 4A:6-1.6(c)4. as providing grounds for an award of SLI benefits.

> 4. Progressive, degenerative or repetitive motion disorders, such as asbestosis or carpal tunnel syndrome, are compensable only when the claim is supported by medical documentation clearly establishing that the disorder would not have occurred but for the performance of specific work duties.

However, it is clear Long-Seavey's neck and back injuries were not the type of progressive, degenerative, or repetitive disorders to which (c)4. was intended to apply *See Matter of Musick,* 143 *N.J.* 206, 211-16 (1996) (noting that the progressive disorders provision was intended to apply to injuries resulting from work duties over a period of time as opposed to injuries which could occur as a result of specific work-related accidents).

We are bound by the factual findings of the

Board when they are supported by the record. *Goodman v. London Metal Exchange, Inc.,* 86 *N.J. 19, 28 (1981).* Moreover, a strong presumption of reasonableness attaches to the actions of an administrative agency. *Smith v. Ricci*, 89 *N.J.* 514, 525 (1982), appeal dismissed, 459 *U.S.* 962 (1982). This presumption of reasonableness will be overcome "only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or other state policy." *Matter of Musick, supra,* 143 *N.J.* at 216. We must defer to an agency's interpretation of its own regulation, promulgated to implement the statute which the agency is charged with administering. *Medical Society v. Department of Law and Public Safety,* 120 *N.J.* 18, 25-26 (1980). Accordingly, we conclude that the Board's findings are supported by the record and its interpretation of the SLI program reasonable.

Affirmed.

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